Re Lim Tai Nian; ex p Kewangan Utama Bhd

HIGH COURT (KUCHING) — BANKRUPTCY PROCEEDINGS NO 29–1018 OF 1999–I
IAN CHIN J
5 JULY 2001

Bankruptcy *— Official Assignee — Sanction — Bankrupt challenging adjudication order — Whether sanction required — When sanction not required — Bankruptcy Act 1967 s 38(1)(a)*

The creditor, Kewangan Utama Bhd, took a bankruptcy petition against the debtor, Lim Tai Nian. The debtor allegedly failed to pay the judgment sum demanded by the bankruptcy notice served on him. The debtor filed a notice of intention to oppose the petition and an affidavit in support. The debtor's counsel was informed that r 117 of the Bankruptcy Rules 1969 had not been complied with and that objection would be taken at the hearing of the petition. The hearing was adjourned. The debtor filed an application to be allowed to take out the missing summons in chambers and requested that the same be heard on the same date where judgment was scheduled to be delivered. The deputy registrar upheld the preliminary objection and dismissed the notice and therefore adjudged the debtor a bankrupt. Hence this appeal was taken out without the sanction of the Official Assignee ('the OA'). One of the issues was whether the requirement of sanction of the OA under s 38(1)(a) of the Bankruptcy Act 1967 applies only to a bankrupt's ordinary claims, ie maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt was challenging the very validity of the adjudication order by which he had been adjudged bankrupt.

Held, dismissing the appeal with costs to the creditor:

(1) The sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction (see p 82D–E).

(2) At the hearing of the bankruptcy petition, the OA is required to state whether he supports the making of a receiving and adjudication order and if the papers are in order, he would invariably support the making of such an order. It would be perverse to expect him to sanction an appeal against the very order which he had supported. Therefore, it is unthinkable that he would give his sanction and this means that a bankrupt could never appeal against an order made against him, even if there is injustice in the making of the order. Such a construction of the law should not be had. Therefore, an undischarged bankrupt has a right to appeal against any order made by the court in exercise of

its bankruptcy jurisdiction and he need not apply for any prior sanction before doing so (see pp 83H–84B).

(3) There was no explanation as to why the application for the extension of time was not filed immediately upon the receipt of the notice on 20 November 2000 and before the first hearing of the petition on 11 December 2000. Therefore, there was no merit in the argument that the SAR had not acted correctly in rejecting the request of the debtor for an adjournment to file the application for an extension of time to lodge the summons in chambers when it was not explained why that application was not made during the period the court had just mentioned (see p 85A–C).

[**Bahasa Malaysia summary**

Pemiutang, Kewangan Utama Bhd, telah mengambil satu petisyen kebangkrapan terhadap penghutang, Lim Tai Nian. Penghutang didakwa telah gagal untuk membayar jumlah penghakiman yang dituntut dalam notis kebangkrapan yang disampaikan ke atas beliau. Penghutang telah memfailkan satu notis berniat untuk membantah petisyen tersebut dan satu afidavit sokongan. Peguam penghutang telah diberitahu bahawa k 117 Kaedah-Kaedah Kebangkrapan 1969 tidak dipatuhi dan bahawa bantahan tersebut akan dibawa ke perbicaraan petisyen tersebut. Perbicaraan telah ditangguhkan. Penghutang telah memfailkan satu permohonan untuk dibenarkan mengambil saman dalam kamar yang tidak difailkan dan memohon agar yang sama didengar pada tarikh yang sama dengan penghakiman yang telah dijadualkan untuk disampaikan. Timbalan pendaftar telah mengekalkan bantahan awal tersebut dan menolak notis tersebut dan oleh itu menghukum penghutang seorang bangkrap. Justeru itu rayuan ini telah dimulakan tanpa sanksi oleh Pegawai Pemegang Harta ('OA'). Salah satu daripada persoalannya adalah sama ada keperluan sanksi OA di bawah s 38(1) Akta Kebangkrapan 1967 terpakai hanya kepada tuntutan biasa seorang bangkrap; iaitu mengekalkan tindakan mahkamah yang melibatkan pihak ketiga, atau adakah ia menjangkau semua tindakan yang melibatkan prosiding, seperti dalam kes sekaranag, di mana si bangkrap telah mencabar kesahihan perintah penghukuman yang telah menghukum beliau seorang bangkrap.

Diputuskan, menolak rayuan tersebut dengan kos kepada pemiutang:

(1) Keperluan sanksi tersebut tidak terpakai kepada kes-kes di mana si bangkrap memohon untuk mencabar satu perintah kebangkrapan, atau di mana beliau memohon untuk dibebaskan atau di mana beliau memohon budi bicara mahkamah untuk mengkaji semula, membatal atau mengubah apa-apa perintah

yang dibuat olehnya di bawah bidang kuasa kebangkrapannya (lihat ms 82D–E).

(2) Semasa perbicaraan petisyen kebangkrapan tersebut, OA dikehendaki untuk menyatakan sama ada beliau menyokong pembuatan satu perintah penerimaan dan penghukuman dan jika dokumen-dokumen adalah teratur, beliau akan setiap kali menyokong pembuatan perintah sedemikian. Ia adalah berlawanan untuk mengharapkan beliau untuk mensanksikan rayuan terhadap perintah tersebut yang beliau telah sokong. Oleh itu, tidak dapat diharap bahawa beliau akan memberi sanksi beliau dan ini bermakna bahawa seorang bangkrap tidak mungkin akan merayu terhadap perintah yang dibuat terhadap beliau, walaupun terdapat ketidakadilan semasa membuat perintah tersebut. Pembentukan undang-undang sedemikian tidak sepatutnya terjadi. Oleh itu, seorang bangkrap yang belum dibebaskan mempunyai hak untuk merayu terhadap apa-apa perintah yang dibuat oleh mahkamah yang menggunakan bidang kuasa kebangkrapannya dan beliau tidak perlu memohon apa-apa sanksi terlebih dahulu sebelum berbuat demikian (lihat ms 83H–84B).

(3) Tiada penjelasan tentang kenapa permohonan untuk lanjutan masa tersebut tidak difailkan serta-merta setelah penerimaan notis pada 20 November 2000 dan sebelum perbicaraan pertama petisyen pada 11 Disember 2000. Oleh itu, tiada merit di dalam hujah tersebut bahawa PKP tidak bertindak dengan betul semasa menolak permintaan pemiutang untuk satu tangguhan bagi memfailkan permohonan untuk satu lanjutan masa untuk memasukkan saman dalam kamar apabila ia tidak dijelaskan kenapa permohonan tersebut tidak dibuat dalam tempoh yang mahkamah telahpun sebutkan (lihat ms 85A-C).]

Notes

For cases on Official Assignee generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1831–1843.

Cases referred to

Bathamani a/p Suppiah v Southern Finance Co Bhd [2000] 6 MLJ 427 (refd)

Baron, Re [1943] 1 Ch 177 (refd)

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)

Khoo Kim Hock, Re [1974] 2 MLJ 29 (refd)

Low Kok Tuan, Re [1997] 4 CLJ 185 (refd)

Perwira Habib Bank (M) Bhd v Samuel Pakianathan [1993] 2 MLJ 423 (refd)

Legislation referred to

Bankruptcy Act 1914 [Eng] s 108(2)
Bankruptcy Act 1967 ss 2, 3(1)(i), 24(4), 33, 38(1)(a), 92(1), 105(1), 108
Bankruptcy Rules 1969 rr 17, 18

Supertinie Bojeng (*Mutang Bojeng & Chai*) for the creditor.
Dominique Ng (*Dominique Ng & Associates*) for the debtor.

Ian Chin J:

Introduction

On 4 August 2000, Kewangan Utama Bhd, the creditor, took the present bankruptcy petition against the debtor Lim Tai Nian. The act of bankruptcy alleged to be committed by the debtor is that he failed to comply with the requisition of a bankruptcy notice that was served on him on 14 February 2000. He failed to pay the judgment sum of RM105,852.62 demanded by the notice. The judgment was obtained against him on 9 April 1999. The debtor filed a notice of intention to oppose petition and an affidavit in support.

The debtor's counsel was on 20 November 2000 informed that r 117 of the Bankruptcy Rules 1969 ('the Rules') has not been complied with and that objection would be taken at the hearing of the petition on 11 December 2000. The hearing was adjourned to 15 January 2001 whence, after hearing argument, it was adjourned to 12 March 2001 for the delivery of the ruling with regard to the preliminary objection. Before the last mentioned date, the debtor on 27 February 2001 filed an application to be allowed to take out the missing summons in chambers and requested that the same be heard on the same date where judgment was scheduled to be delivered. The deputy registrar on 12 March 2001 upheld the preliminary objection and dismissed the notice and therefore adjudged the debtor a bankrupt. Hence this appeal which was taken out without the sanction of the Official Assignee ('the OA').

Whether the debtor can appeal without the sanction of the OA

Does s 38(1)(a) of the Bankruptcy Act 1967 ('the Act') applies as to require prior sanction of the official assignee before the debtor can appeal against the order making him a bankrupt? That section is in these terms:

> (1) Where a bankrupt has not obtained his discharge —
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the OA; ... .

That section has been construed by the court in *Re Khoo Kim Hock* [1974] 2 MLJ 29, *Re Low Kok Tuan* [1997] 4 CLJ 185 and *Bathamani a/p Suppiah v Southern Finance Co Bhd* [2000] 6 MLJ 427.

Re Khoo Kim Hock concerns an application to have the adjudication order annulled under ss 92(1) and 105(1) of the Act and the court there held:

(1) s 38(1)(a) does not apply to an application under s 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the OA is necessary in the present case;

(2) an undischarged bankrupt in this country is entitled to engage an advocate and solicitor to represent him in any action where the provision of s 38(1)(a) does not apply or where the cause of action does not vest in the OA.

I would respectfully agree entirely with what Mohamed Azmi J (as he then was) said in that case, at p 30, viz:

The first question for determination is whether the requirement of sanction of the OA under s 38(1)(a) of the Act applies only to a bankrupt's ordinary claims, ie maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in s 38(1)(a) of the Act clearly indicates that the section is intended to apply only to actions for recovery of something - either real or personal — which can be turned into assets such as a claim for recovery of property or money due. Further, there is nothing in ss 33, 92 or 105 of the Act to indicate that it is the intention of the legislature to require prior sanction of the OA before a bankrupt can seek relief under those provisions. Under s 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and there is no legal requirement that for this purpose he should first obtain the sanction of anyone. This is also the case where an application is made to the court under ss 92(1) and 105(1) of the Act. It is true that s 24(4) provides that when a debtor is adjudged bankrupt his property shall become divisible amongst his creditors and shall vest in the OA. The word 'property' is defined by s 2 of the Act to include money, goods, things in action, land and every description of property, whether real or personal, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined. 'As such, only property as defined above would vest in the OA at the time of adjudication, and from the definition, unless something can be turned into an asset for payment of debts to the creditors it cannot be described as property within the meaning of s 2 of the Act. The present application being not things in action or chose in action cannot be described as something which can be turned into asset for the estate of the bankrupt.

A In *Re Baron* [1943] 1 Ch 177, s 108(2) of the English Bankruptcy Act 1914 was considered. That section appears in the Act in these words:

> Appeals
>
> Appeals in bankruptcy
>
> 108(1) Every court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
>
> (2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal, as follows:

In that case a receiving order was made against the debtor in 1942 and an adjudication order was made against him in 1943 after an application by the OA and after creditors meeting had resolved to do so. The debtor appealed against the order and appeared in person. The court there dealt with the point of the right of the creditors to appear and the court there held that they have no right since the application to have the debtor adjudged a bankrupt was brought by the OA. What is significant is that despite being adjudged a bankrupt he was still allowed to appeal and there was no sanction. This tends to support the view of Mohamed Azmi J. The matter in the present case is governed by s 92 which reads:

> Appeals
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> 92 Appeals in bankruptcy
>
> (1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
>
> (2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.
>
> (3) For the purposes of this section the OA shall be deemed to be aggrieved by the refusal of any application made by him to the court.

Clearly then, on the authority of *Re Khoo Kim Hock* an appeal by an undischarged bankrupt is not caught by s 38(1) of the Act and therefore no prior sanction of the OA is required. Section 92 of the Act is in substance the same as the English s 108 where the bankrupt in *Re Baron* was able to appeal without any sanction. Now s 92 of the Act is not concerned only with adjudication orders only but with 'order made … under its bankruptcy jurisdiction' and 'orders in bankruptcy matters'. The plain and simple meaning of those terms would include, for example, order of stay or refusal of stay or order of extension or refusal of extension of time to do sometime. Therefore, I am unable to agree with *Re Low Kok Tuan* which, though it did not disagree with *Re Khoo Kim Hock*, decided that an undischarged bankrupt cannot appeal against an order refusing a stay of the bankruptcy petition. After all, the right to appeal is not a chose in action that can be vested in the OA as said in *Re Khoo Kim Hock*. For those reasons too, I am unable to agree with *Bathamani*. At the hearing of the bankruptcy petition, the OA is required to state whether he supports the making of a receiving and adjudication order and if the papers are in order, he would invariably support the making of such an order. It would be perverse to expect him to

sanction an appeal against the very order which he had supported. Therefore, it is unthinkable that he would give his sanction and this means that a bankrupt can never appeal against an order made against him, no matter if there is injustice in the making of the order. Such a construction of the law should not be had. For that reason too I am unable to agree with the said two decisions. Therefore, I am of the view that an undischarged bankrupt has a right to appeal against any order made by the court in exercise of its bankruptcy jurisdiction and he need not apply for any prior sanction before doing so.

Was the making of the receiving and adjudication order proper

It is now common ground that the debtor should have, apart from filing the documents I have mentioned earlier to oppose the petition, also taken out a summons in chambers (see *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298) though learned counsel for the debtor argued otherwise before the senior assistant registrar ('the SAR'). But learned counsel had also requested for an extension of time to file the necessary summons in chambers which was not granted. After the SAR had reserved her judgment, the debtor lodged an application for an extension of time to file the missing summons in chambers. This application was heard after the court on the scheduled date of 12 March 2001 delivered its decision and made the debtor a bankrupt. The application for extension of time was therefore of no consequence and it was subsequently struck off.

The grounds of the appeal against the receiving and adjudication order are these:

(i) The honourable SAR failed to give the judgment debtor a chance to rectify an insufficient notice by debtor of intention to oppose petition by filing the requisite summons in chambers in accordance with r 18 of the Bankruptcy Rules 1969 and never took due consideration of the summon in chambers filed by the judgment debtor on 27 February 2001 seeking extension of time, etc, to file the said requisite summons in chamber.

(ii) The honourable SAR never considered the notice by debtor of intention to oppose petition and the affidavit in support which have shown obvious merits in that there are serious and bona fide issues to be considered in that questions on the illegality or voidness of the Hire Purchase Act 1967 have been raised and even more seriously, that fraud in the plaintiff or by the plaintiff's officers has been raised and particularized therein.

(ii) That there has never been any proper trial or hearing on the merits of any of the abovementioned grounds … in the lower courts.

The debtor also filed an affidavit in support of the notice of appeal.

As for the ground (i) it will be recalled that the debtor's counsel was informed as far back as 20 November 2000 about the defect in the documents that had been filed in purported opposition to the bankruptcy petition. Nothing was done to rectify the situation until 27 February 2001

by which time the debtor had already argued that the notice of opposition was in order which was obviously unsustainable. Having done so and in anticipation that the argument may not be successful, the debtor wanted a second bite of the cherry by filing the application for the extension of time after the court had adjourned to consider her judgment. On top of that there was no explanation as to why the application for the extension of time was not filed immediately upon the receipt of the notice on 20 November 2000 and before the first hearing of the petition on 11 December 2000. Therefore, there was no merit in the argument that the SAR had not acted correctly in rejecting the request of the debtor for an adjournment to file the application for an extension of time to lodge the summons in chambers when it was not explained why that application was made during the period I have just mentioned. As for ground (ii), there is nothing for the court to consider in so far as those matters for which a summons in chambers was required, since the failure to file such render the opposition ineffective. As for the other matters which may be regarded as constituting a counterclaim, set-off or cross demand, these were put forth in the lower court in which judgment was given. The debtor was given leave to defend conditional upon him paying into court the sum claimed. He did not pay the money into court as a result of which judgment was entered. It will be remembered that s 3(1)(i) of the Act says that one of the requirements is that such matters could not be set up in the action in which judgment was entered. In this case, it was in fact set up but they failed because the debtor did not pay the sum claimed into court as a condition for defending. At best the allegations of fraud by the debtor can be regarded as supporting a counterclaim. They do not support a set off or cross demand. For a counterclaim to be a defence to a bankruptcy petition, three ingredients must be satisfied. These are that: (i) it can be quantified and must be quantified; (ii) it was put forth in good faith and had a reasonable probability of success; and (iii) it could not have been set up in the court in which judgment was entered (see *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423). As for the requirement (ii), it can be assumed that it has been satisfied because the creditor did not file any affidavit pointing to evidence that says otherwise. In this regard assertions of facts by the creditor's counsel in her submission will have to be disregarded as being pure summation unsupported by evidence. Be that as it may, the debtor had failed to satisfy requirement (i) and (iii). The counterclaim was not quantified and the counterclaim was in fact set up in the lower court but unsuccessfully.

Conclusion

In the premises, the appeal is dismissed with costs to the creditor. The stay which I have granted on 8 June 2001 is lifted.

Appeal dismissed.

Reported by Wong Ee Lynn